

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TOMMY E. FULCHER
Claimant

VS.

CITY OF WICHITA
Self-Insured Respondent

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Docket No. **1,052,825**

ORDER

Claimant requests review of the February 9, 2012 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on May 16, 2012.

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared for the claimant. Edward D. Heath Jr. of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that the Award compensation paragraph contains a typographical error and should read that claimant is entitled to compensation for a permanent partial whole person functional impairment instead of a work disability as only a functional impairment was claimed and awarded.

ISSUES

It was undisputed that claimant suffered a compensable injury but the parties were unable to agree upon the percentage of functional impairment he suffered as a result of his work-related accident. The Administrative Law Judge (ALJ) adopted two of the treating physicians' opinions and found claimant sustained a 9 percent whole person functional impairment.

The claimant requests review of the nature and extent of disability. He argues that his medical expert's rating opinion is more persuasive and, consequently, his whole person functional impairment should be increased to 27 percent. Conversely, the respondent argues the ALJ's Award should be affirmed.

Because claimant returned to work with respondent for wages equal to or more than his average gross weekly wage at the time of his injury, the sole issue for Board determination is the nature and extent of his whole person functional impairment.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant is employed as a police officer for respondent. On September 1, 2010, claimant was on patrol in the city of Wichita when his car was hit head on by an uninsured drunk driver. He described the accident:

Driving south on McLean at 2:30 in the morning just finishing up a DUI saturation patrol. Only two cars on the street of McLean at that time at 2:30 in the morning. I was going south. I saw another vehicle coming north. We got to the intersection of Harry and McLean and I was slowing down for the red light. Right before the intersection 15, 20 feet the light turns green, I get ready to accelerate and I see the headlights of the other car shake a little bit. I didn't really think anything about it and we get right in the intersection and all of a sudden just that quick the headlights of that car are now in front of me and we collided head on just that quick.²

Claimant was possibly unconscious for a short period of time and then was taken by ambulance to Wesley Hospital's emergency room. Claimant received treatment which involved his right knee, left shoulder, low back and right hip. Claimant described his treatment as consisting of medication (muscle relaxers) and physical therapy. Claimant further testified that Dr. John Osland provided him with treatment for his right knee, left shoulder and right hip. Claimant noted that Dr. Osland initially provided him treatment for his low back but then referred him to Dr. Sandra Barrett.

Dr. Osland saw claimant on October 22, 2010. Claimant's primary complaint was left shoulder pain. Dr. Osland noted claimant had suffered a non-displaced proximal fibular fracture but claimant indicated that injury was doing fine. Claimant was diagnosed with left shoulder impingement. Claimant received a steroid injection into his left shoulder's subacromial space. On November 9, 2010, claimant had a follow-up visit with Dr. Osland and noted his left shoulder was improving but he had developed soreness in his right hip and low back. Dr. Osland suggested claimant move his gun from his hip to his thigh and released claimant back to work.

¹ See K.S.A. 44-510e(a).

² R.H. Trans. at 8-9.

Claimant next saw Dr. Osland on December 28, 2010, and he noted some soreness in his left shoulder but increased soreness in his right hip and low back. Claimant was prescribed Flexeril and an MRI of the low back was scheduled. The MRI was performed on December 29, 2010, and revealed degenerative disk disease with no disk herniation. On January 4, 2011, Dr. Osland met with claimant and continued him on medication. At the next office visit on February 1, 2011, Dr. Osland noted claimant complained of continued right hip and low back pain. Dr. Osland then referred claimant to Dr. Barrett noting that the MRI's of claimant's back and pelvis were essentially unremarkable. At the February 8, 2011, follow-up visit, Dr. Osland noted that the MRI of claimant's pelvis had indicated an enlargement of claimant's prostate gland.

Claimant met with Dr. Barrett, board certified in physical medicine and rehabilitation, on March 7, 2011, with a chief complaint of hip and low back pain. Dr. Barrett diagnosed claimant with low back and hip pain consistent with right SI joint dysfunction. She referred claimant for an SI block under fluoroscopic guidance and prescribed a TENS unit. When claimant returned for a follow-up visit with Dr. Barrett on April 14, 2011, she noted that he had been diagnosed with prostate cancer which had spread and it was noted the back pain was probably secondary to the cancer rather than from the work-related injury. Claimant understandably opted to concentrate on treatment for the prostate cancer.

Dr. Farha diagnosed claimant's prostate cancer and the doctor informed claimant that he had a fairly short time to live. A radical prostatectomy was performed. Claimant lost a tremendous amount of weight but the positive result was that he is now cancer free. At the time of the regular hearing, claimant was still having pain in his knee, right hip, back, and left shoulder. Claimant is back to work doing his normal job and earning the same money as before his accident.

Dr. Pedro Murati, board certified in rehabilitation and physical medicine, examined and evaluated claimant on May 4, 2011, at the request of claimant's attorney. The doctor reviewed claimant's medical records and also took a history from him. Upon physical examination, Dr. Murati found the following: (1) a missing left pronator and depressed left triceps; (2) decreased sensation along the left C6 dermatome; (3) positive Spurling's exam of the neck; (4) missing right lateral flexion; (5) trigger points of the left shoulder girdle extending into the cervical thoracic paraspinals; (6) positive right SI examination; (7) a positive Patrick exam of the right hip; (8) tender trochanteric bursa on the right; (9) a positive right patellar compression, medial and lateral apprehension exam; and, (10) moderate crepitus of the right knee. The doctor diagnosed claimant with low back sprain, right sacroiliac dysfunction, status post right fibular fracture, right trochanteric bursitis, myofascial pain syndrome of the left shoulder girdle extending into the cervical and thoracic paraspinals, right patellofemoral syndrome, neck pain with signs and symptoms of radiculopathy, and left rotator cuff sprain. Dr. Murati opined that claimant's current diagnoses are a direct result of his work-related motor vehicle injury sustained on September 1, 2010, while working for respondent. The only restriction claimant had was to work as tolerated and use common sense.

Based on the *AMA Guides*³, Dr. Murati rated claimant's neck pain with signs of radiculopathy at 15 percent whole person impairment which placed claimant in the Cervicothoracic DRE Category III. For claimant's myofascial pain syndrome affecting the thoracic paraspinals, he was given a 5 percent whole person impairment placing claimant in the Thoracolumbar DRE Category II. A 5 percent right lower extremity impairment was given for the patellofemoral syndrome of the right knee. And a 7 percent right lower extremity impairment for the right trochanteric bursitis. These right lower extremity impairments combine for a 12 percent which converts to a 5 percent whole person impairment. For claimant's low back sprain, Dr. Murati placed claimant in the Lumbosacral DRE Category II for a 5 percent whole person impairment. Using the combined value charts, the whole person impairments combine for a 27 percent impairment.

Dr. Osland examined claimant again on June 7, 2011. Claimant noted that when a biopsy was performed on his prostate the pain in his hip extremely worsened. Consequently, Dr. Osland opined claimant's hip pain was probably related to claimant's prostate cancer. Dr. Osland further opined claimant was at maximum medical improvement for his left shoulder. According to the *AMA Guides*, Dr. Osland rated claimant's left shoulder weakness at 6 percent. Dr. Osland concluded that he did not have any further ratings for claimant.

Dr. Sandra Barrett, board certified in physical medicine and rehabilitation, testified that based upon DRE Category II of the *AMA Guides*, claimant sustained a 5 percent whole person impairment due to his lower back which incorporated his SI joint. Dr. Barrett further testified that claimant did not qualify for a rating for his hip.

Because claimant has returned to a comparable wage job with respondent he is limited to an award based upon the percentage of his functional impairment.⁴ Functional impairment is defined by K.S.A. 44-510e(a), as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.⁵ It is the function of the trier of fact to decide which

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

⁴ K.S.A. 44-510e(a).

⁵ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trial court must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.⁶

It should be noted that during his treatment with Dr. Osland the claimant complained of pain to his left shoulder, right hip and low back. Dr. Osland was aware of the fracture to claimant's fibula but claimant said that injury was fine, with the exception of one instance where he complained a change of weather had made his knee sore. Dr. Osland ultimately attributed claimant's hip pain to his prostate cancer. And after Dr. Osland last examined claimant in June 2011, the doctor concluded claimant's only ratable condition was his left shoulder. Likewise, Dr. Barrett did not think claimant's hip complaints warranted a permanent impairment. Consequently, it is difficult to find merit in Dr. Murati's ratings to claimant's cervical spine, thoracic spine and knee when the claimant did not complain of those areas while undergoing treatment. Moreover, Dr. Murati rated claimant with chronic trochanteric bursitis at 7 percent, but agreed that pursuant to the *AMA Guides* such a rating required an antalgic gait which the doctor did not find or note upon his examination of the claimant. The doctor's further explanation that even if claimant was not limping when he had been examined, he was sure claimant would eventually limp is simply speculative and not persuasive.

The ALJ determined that the opinions of Drs. Osland and Barrett were more persuasive than Dr. Murati's opinions. Consequently, the ALJ adopted Dr. Osland's 6 percent rating to claimant's left shoulder and Dr. Barrett's 5 percent rating for claimant's back. The impairments were then combined for a 9 percent whole person functional impairment. The Board agrees and affirms.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁷ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated February 9, 2012, is modified to correct the award being for a 9 percent disability based upon an impairment of function, not a work disability, but is otherwise affirmed.

⁶ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

⁷ K.S.A. 2011 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this _____ day of June, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

e: Robert R. Lee, Attorney for Claimant, rob@ksworkcomplaw.com
Edward D. Heath Jr., Attorney for Respondent, heathlaw@swbell.net
John D. Clark, Administrative Law Judge